sequently knowledge should be unnecessary and the fact that the employee knew of the dangerous condition no longer makes him a willing victim. In the principal case, it appears that the particular position in which the employee was required by his employment to be, was unsafe in so far as it exposed him as a target to the neighborhood boys. Had the employer known of this situation, it is undoubted law that recovery could be had as for injury arising out of the conditions under which the employee was required to work[22]—because the employer had not furnished a safe place to work. The risk is none the less real nor the position more safe for the employee because the employer did not know. It is submitted that, fault being eliminated, recovery in the principal case can be sustained as for an injury resulting from a risk attached to the particular location where the employee was required to be which made that location unsafe, even though the agency causing the harm was not under the control of the employer.[23]

THE NEW YORK PRACTICE ACT

For some years past, a movement has been in progress looking to a reform in the civil procedure in the courts of the State of New York. The simple Code of Procedure drawn by David Dudley Field, and adopted in 1848, which furnished a model for almost all of the other states of the Union, had grown to such dimensions as to constitute a voluminous, intricate and inelastic system of civil practice in our courts, which involved great expense to litigants, and too frequently led to the merits of the controversies being entirely obscured by questions of mere procedure. Some twenty years ago, the Committee on Law Reform of the New York State Bar Association recommended the repeal of the Code of Civil Procedure, and in its place the adoption of a simple practice act containing the more important provisions of the existing code, rearranged and revised, and supplemented by rules of court. Similar recommendations were made by other bodies, and in 1904, the Board of Statutory Consolidation was created by the Legislature, and authorized, not only to consolidate the general statutes of the state, but to revise the practice in the courts. Pursuant to this act and to supplementary acts of the legislature, which, in

[22] *McNicol's Case* (1913) 215 Mass. 497, 102 N. E. 697; *Schmoll v. Weisbrod & Hess Brewing Co.* (1916) 89 N. J. L. 150, 97 Atl. 723.

[23] This position is supported by both English and American authority. *Thorn v. Sinclair* [1917] A. C. 127, 116 L. T. 609; *Kimbal v. Industrial Accident Commission* (1916) 173 Calif. 351, 160 Pac. 150. The vigorous dissenting opinion in the California case shows the difficulty of judges trained in common-law principles of liability to enforce a duty to pay when there is no fault. There is, however, authority contra: *Cennel v. Daniels Co.* (1918) 203 Mich. 73, 168 N. W. 1009.

1913, specifically directed the Board to prepare and present to the legislature a practice act, rules of court, and short forms, the Board of Statutory Consolidation, in 1915, submitted to the legislature a proposed simple civil practice act and rules of court, designed to simplify the practice in the courts of the state. In the same year, the Constitutional Convention, then sitting, adopted as a part of the revised state constitution recommended by it, a provision making it the duty of the legislature to act upon that report with all convenient speed, to enact a brief and simple civil practice act, and to adopt a separate body of civil practice rules for the regulation of procedure in the courts of record of the state. Thereafter, the proposed constitution provided, from time to time at intervals of not less than five years, the legislature was to appoint a commission to consider and report what changes, if any, there should be in the law and rules governing civil procedure. It further provided as follows:

"The legislature shall act on the report of each such commission by a single bill, and the legislature shall not otherwise, or at any other time, enact any law prescribing, regulating or changing the civil procedure in the Court of Appeals, Supreme Court, or County Court, unless the judges or justices empowered to make and amend civil practice rules shall certify that legislation is necessary. After the adoption of the civil practice rules by the legislature . . . the power to alter and amend such rules and to make, alter, and amend civil practice rules shall vest and remain in the courts of the State . . ."

This constitution was not adopted by the people at the general election in November, 1915, when it was submitted for their ratification. The report of the Board of Statutory Consolidation was referred by the Legislature of 1915 to a joint legislative committee, and has been under consideration by it continuously since that year. In the meantime, and as the first result of the general agitation over the subject of the reform of civil practice, very radical amendments were made in the Code of Civil Procedure: many provisions of substantive law which had found their way into its sections were removed by legislation and transferred to appropriate places in the general statutes, and the provisions relating to particular courts were grouped under the heads of those respective tribunals. One thing became very apparent during the hearings and discussions over the proposed new legislation, and that was that a very widespread sentiment among the lawyers of the state was opposed to vesting in the judges the power to prescribe rules of practice beyond the very limited scope left to them by the existing code. As a final result of its consideration of the subject, the joint legislative committee submitted a report to the Legislature of 1919, which proceeded on a different theory from that recommended by the Board of Statutory Consolidation. It proposed to continue the Code of Civil Procedure, simplified and made more elastic in many of its provisions, to separate entirely from it the provisions relating to

special courts, such as the Surrogates' Courts, the Municipal Courts and other courts of special jurisdiction, and by incorporating in the code of civil procedure, which was to be called the Civil Practice Act, provisions designed to make the practice less technical than it had been, to meet the general demand of the bar for radical amendment. The bill embodied in this report was passed by both houses of the legislature at the session of 1920, and approved by Governor Smith on May 24, 1920. It is still open to the fundamental objection which attached to the Code of Civil Procedure, in that its provisions will be subject to constant legislative tinkering. The Field Code of 1848 was a model of simplicity, so far as its provisions were concerned. From the moment of its enactment, it encountered the persistent hostility of a bench and bar which had been educated under the common-law system, and the decisions made under it were constantly overruled by legislative enactment, until the amendment and revision of the Code became an annual legislative exercise, and a vast structure of statutory enactment was built up, year by year, like a coral reef, partially submerged in a sea of ignorance of the history of the provisions which constantly called for construction in the courts, and provoked amendment by the legislature. It was to meet this constant temptation to meddle with the rules of practice that the provision above referred to in the Constitution of 1915 was inserted, forbidding the legislature, except at five year intervals, to amend the practice act, unless requested so to do by the board of judges. For this reason, and because of its departure from the theory which had been urged upon the legislature for twenty odd years past, much opposition to the approval by the Governor of the new act has been expressed in the State and local Bar Associations. But in view of the obvious improvements which it makes in the existing Code of Civil Procedure, and the apparent impossibility of securing the enactment of what may be called the ideal plan above referred to, both the State and local Bar Associations united in requesting the Governor to approve the bill.

The former Code of Civil Procedure was divided into twenty-three chapters, composed of 3,383 sections. The new Civil Practice Act eliminates from the practice code and distributes to special codes relating to Surrogates' Courts, Justices' Courts, etc., 752 sections, and by combination and elimination reduces the whole number of sections in the Practice Act to 1,536, distributed among 89 articles. It would be impracticable, within the limits of this COMMENT, to attempt a review of the changes in procedure introduced by this new act, but attention may be called to a few which are of fundamental importance and which must have the effect of greatly reducing the number of interlocutory applications to courts and the number of appeals on questions of mere procedure. Thus, by section 209, it is enacted that all persons may be joined in one action as plaintiffs,

"in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that if upon an application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found entitled to relief for the relief to which he or they may be entitled."

Again, in section 212, it is provided that it shall not be necessary that each defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

By section 213, where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties.

The chapter relating to pleading provides that

"the defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defense or reply, as the case may be, which, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, statute of limitations, release, payment, facts showing an illegality either by statute, common law or statute of frauds. The application of this section shall not be confined to the instances enumerated."

Most liberal provisions are made for dealing with mistakes or irregularities. Section 105 provides that

"at any stage of any action, special proceedings or appeal a mistake, omission, irregularity or defect may be corrected or supplied, as the case may be, in the discretion of the court, with or without terms, or, if a substantial right of any party shall not be thereby prejudiced, such mistake, omission, irregularity or defect must be disregarded."

No action or special proceeding shall be allowed to fail or be dismissed on the ground of a mistake in the court in which it is brought, but in such case it shall be removed to the proper court, and subsequent proceedings therein shall be the same as if it had been originally there instituted.

It is further provided by section 111, that

"whenever in any action or special proceeding it shall appear at any stage of the proceedings, or upon appeal, that the appropriate remedy

upon the facts pleaded or alleged, or proved, is different from that asked for in the pleadings or corresponding papers, the proceedings may be amended upon such terms as may be just, if jurisdiction exists to grant the proper remedy, and may be continued and determined by the court, and at the term where then pending, or remitted, to the proper term or court to be disposed of, in order that the relief may be finally granted which is appropriate to the facts, to the same extent as if the application had been in the first instance for the relief granted. The court may correct by amendment all defects and irregularities in matters of form or procedure and may bring in all parties necessary to completely determine the matter and award the appropriate relief upon the facts established."

Many other provisions are to be found through the act tending to prevent mere technicalities from defeating the course of justice, and requiring adequate notice to be given of applications for relief to protect the interests of clients from destruction or injury by mere slips in practice, and greatly simplifying the method of bringing controversies into court for appropriate adjudication upon the merits. Any objection to a pleading is required to be distinctly specified in the answering pleading, or in a notice of motion based on the pleading, specifically pointing out the particular defect relied upon. Demurrers are abolished, and objections to pleadings in point of law for grounds appearing on the face of the pleading, and the court rules may define what objections may be taken by motion only. The right is given to every party to an action to take the deposition of himself or his adversary before trial, as well as the testimony of the assignor of a claim which constitutes the cause of action in suit. A new provision[1] is inserted empowering the Supreme Court in any action or proceeding

"to declare rights and other legal relations on request for such declaration, whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment."[2]

The rules of court are to make such provisions as shall be necessary and proper to carry the provisions of this section into effect. Judgment may be rendered by the court in favor of any party or parties and against any party or parties at any stage of the action or appeal, if warranted by the pleadings or the admissions of a party or parties, and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require. A non-suit or dismissal of a complaint or counterclaim at the close of the plaintiff's or the defendant's evidence, as the case may be, or a dismissal of a complaint or counterclaim at the close of the whole evidence, is declared to be a final determination of the merits of the action, and to bar a new action between the same parties, or their

[1] Section 473.

[2] See COMMENT (1920) 29 YALE LAW JOURNAL, 545; and (1918) 28 *ibid.*, 1,105.

privies for the same cause of action, unless the court shall dismiss without prejudice.

All of these provisions are in line with the most enlightened and advanced views of simplification of practice in courts. Some of the provisions are taken from the English practice acts; others are inspired by the provisions of the revised United States Equity Rules, and all of them tend to require rules of practice, whether promulgated by the legislature or the courts, to be treated as mere procedural regulations, and not as statutory provisions conferring substantive rights. If these provisions shall be liberally interpreted and applied by the courts to carry out the beneficent purpose of their enactment, and the legislature shall refrain from constant amendment until time and experience shall have afforded an opportunity to test their adequacy, a very considerable advance will have been made towards the attainment of as simple a method of civil procedure as the complex nature of our social organization permits.

GEORGE W. WICKERSHAM.

THE OHIO COURT AND THE *mores*

Stare decisis. The Supreme Court of Ohio is hitting heads as it sees them. This is indicated by readiness to overrule decisions of long standing and by free and vigorous dissent. The doctrine of *stare decisis* has often been silently honored in the breach, and it is interesting to observe a court openly and consciously moulding the statements of the law to suit the prevailing *mores* of the time. "A decided case is worth as much as it weighs in reason and righteousness, and no more. It is not enough to say 'thus saith the court.'" Thus saith the court in *Adams Express Company v. Beckwith* (1919, Ohio) 126 N. E. 300.[1] The suit was against one of several tort-feasors. The plaintiff had previously received a sum of money from another of the joint tort-feasors and had given to that one a written agreement never to sue him, expressly reserving all rights against the present defendant. The court very properly construed this agreement in accord with the evident intention of the parties and held that it did not operate as a release of the defendant. At the same time it expressly overruled a case[2] that it conceded "has been the law of Ohio since 1825." Even had the document been under seal and contained

[1] See to the same effect *Kintz v. Harriger* (1919, Ohio) 124 N. E. 168, quoted in (1919) 29 YALE LAW JOURNAL, 106. Some courts will reverse themselves in the same case on a later appeal. See *Johnson v. Cadillac Motor Car Co.* (1920, C. C. A. 2d) 261 Fed. 878, reversing (1915) 221 Fed. 801, (1920) 29 YALE LAW JOURNAL, 568.

[2] *Ellis v. Bitzer* (1825) 2 Ohio, 89, 15 Am. Dec. 534. And see in accord *Ruble v. Turner* (1808, Va.) 2 Hen. & M. 38.